IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION TO AMEND SELECTED PROVISIONS OF TENNESSEE SUPREME COURT RULE 8

No. ADM2016-01382

ORDER

On July 11, 2016, the Tennessee Bar Association ("TBA") filed a petition asking the Court to amend Rule 8 of the Rules of the Tennessee Supreme Court. In summary, the TBA proposes to amend selected portions of Rule 8 in light of similar revisions to the American Bar Association's Model Rules of Professional Conduct that were adopted by the ABA's House of Delegates in August 2012; those proposed amendments to Rule 8 are set out in Exhibit A to the Petition. In addition, the TBA also proposes a number of housekeeping amendments to Rule 8 to update certain cross-references to other provisions that have changed, such as the numbering of sections within Tenn. Sup. Ct. R. 9, and similar issues; those proposed housekeeping amendments are set out in Exhibit B to the TBA's Petition. A copy of the TBA's petition (including Exhibits A and B) is attached as the Appendix to this order.

The Court hereby solicits written comments regarding the TBA's proposed amendments from judges, lawyers, bar associations, members of the public, and any other interested parties. The deadline for submitting written comments is Thursday, November 17, 2016. Written comments should be addressed to:

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 8
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

and should reference the docket number set out above.

The Clerk shall provide a copy of this Order, including the Appendix, to LexisNexis and to Thompson Reuters. In addition, this Order, including the Appendix,

shall be posted on the Tennessee Supreme Court's website. The Court also directs the TBA to serve a copy of this order on the individuals and organizations listed in Exhibit C to the Petition; because the TBA previously served the Petition and Exhibits on those individuals and organizations, the TBA, in serving a copy of this order, is not required to include the attachments to the order.

IT IS SO ORDERED.

PER CURIAM

APPENDIX

TENNESSEE BAR ASSOCIATION'S PETITION TO AMEND SELECTED PROVISIONS OF TENNESSEE SUPREME COURT RULE 8

(filed July 11, 2016)

IN THE SUPREME COURT OF TENNESSEE

IN RE:	)	
	)	
PETITION FOR THE ADOPTION OF AMENDMENTS TO SELECTED PROVISIONS OF TENN. SUP. CT. R. 8	)	No. ADM2016-01382

PETITION OF THE TENNESSEE BAR ASSOCIATION FOR THE ADOPTION OF AMENDMENTS TO SELECTED PROVISIONS OF TENN. SUP. CT. R. 8

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The Tennessee Bar Association ("TBA") petitions the Court to adopt amendments to selected portions of Rule 8 of the Tennessee Supreme Court that are patterned after similar revisions to the ABA Model Rules that were adopted in August 2012 after completion of the work of the ABA Commission on Ethics 20/20 ("Ethics 20/20 Commission"). The specific revisions proposed by the TBA are identified on Exhibit A and, other than one set of revisions made to the ABA Model Rules and not being proposed herein, track the ABA Model Rules revisions. In addition, as a housekeeping measure, the TBA also is proposing a few further revisions that would serve to update Rule 8 to correct certain changes in internal references to other provisions that have changed, such as the numbering of sections within Tenn. Sup. Ct. R. 9, and similar issues, *see* Exhibit B. In support of the adoption of its proposed amendments, the TBA states as follows:

BACKGROUND

In August 2012, the ABA House of Delegates approved a slate of amendments to the ABA Model Rules that had been proposed by the Ethics 20/20 Commission. In 2015, the TBA's Standing Committee on Ethics and Professional Responsibility undertook an evaluation of those revisions, which included ascertaining the popularity of those revisions in terms of the number of jurisdictions that had embraced them through revisions to their own rules and studying whether there were any of those revisions that ought not to be recommended for adoption in Tennessee. At the end of that process, that committee presented its recommendation to the TBA that all of the August 2012 ABA Ethics 20/20 revisions, with the exception of certain proposed revisions to RPC 4.4 and its Comment, be pursued.

As of June 15, 2016, twenty-five states have adopted all, or at least significant portions of, the August 2012 ABA Ethics 20/20 revisions.[1] The TBA now proposes that this Court take action to make Tennessee the twenty-sixth state to do so. The bulk of the changes to the ABA Model Rules that came about as a result of the work of Ethics 20/20 focus upon issues related to increased use of technology in the practice of law (and the rapidly advancing nature of such technology), new forms of advertising, increasing globalization in the modern practice of law including the use of outsourcing, and lawyer mobility issues.

THE TBA'S PROPOSAL

The TBA proposes that the Court adopt all of the revisions set forth on Exhibit A. The substantive contents of the proposed revisions can be summarized, as follows:

- RPC 1.0(n) & Cmt. [9] – The word "e-mail" is replaced with the term "electronic communications" both in the text of the definition of the words "writing" or "written" and when referenced in the comment addressing screening. The rationale for such a change is, of course, the fact that email is, in the modern law practice, just one of several forms of electronic communications lawyers and clients use to exchange written communications.

- RPC 1.1 – New comments [6] and [7] address ethical requirements lawyers have with respect to obtaining the informed consent of their clients before retaining services for the client from lawyers outside of the lawyers own firm and address other related issues. Language added to an existing comment, now renumbered as [8], highlights for lawyers the fact that their ethical obligation of competence requires lawyers to include the benefits and risks associated with relevant technology among the topics to stay abreast of regarding changes in the law and its practice.

- RPC 1.4 – Existing Comment [4] is amended and updated to make the point that telephone calls are no longer the only kind of communication lawyers have with clients and that duty of communication with clients means that lawyers should respond promptly, or at least promptly acknowledge, a variety of kinds of communications used by clients and lawyers alike.

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[1] The ABA, through its Center for Professional Responsibility, makes available several online resources that include a chronological list of those jurisdictions that have taken action to adopt all or parts of the Ethics 20/20 revisions, available at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chron_adoption_e_20_20_amendments.authcheckdam.pdf.

• RPC 1.6 – A new (b)(6) is added to the rule to address the practical reality of the need for lawyers and law firms to share some information related to representation of clients when making lateral hiring decisions or events such as mergers in order to be able to detect and resolve conflicts of interest. The proposed language reconciles the obligation of confidentiality under RPC 1.6 and the obligation to avoid conflicts of interest under RPC 1.7 in a common-sense fashion and in a manner that likely reflects how lawyers and law firms have addressed such issues in reality for many years. A new (d) is added that is composed of language that has previously existed in the Comment to RPC 1.6 addressing the obligations lawyers have to take reasonable steps to safeguard information related to representation possessed by lawyers. New Comments [13] and [14] are added to elaborate on new RPC 1.6(b)(6) , and, after renumbering, two existing comments are revised and expanded upon in light of the elevation of the duty to safeguard information from the comments to the text of the rule. *See* RPC 1.6 Cmt. [18]-[19].

• RPC 1.17 – Comment [7] is revised as a result of the adoption of RPC 1.6(b)(6).

• RPC 1.18 – Revisions to the language used in (a) and (b) are made, "discusses" changed to "consults" and "had discussions" changed to "learned information from," and Comment [2] is greatly expanded upon to better explain the difference between interactions with members of the public that ought not qualify as a consultation triggering the duties owed to, and protections provided for, prospective clients under this rule. The comment also includes language to make clear that someone who is only communicating with a lawyer for the purpose of disqualifying them from some matter is not to be treated as a prospective client.

• RPC 4.4 – Because Tennessee has a different approach to the ethical duties owed by lawyers in the case of receipt of inadvertent or unauthorized disclosures than that set forth in the ABA Model Rules, the only revisions to this rule and related comment embraced in the TBA's proposal relate to making clear that the duties established by Tennessee apply to documents and to electronically stored information.

• RPC 5.3 – The title of this rule, and its comments, are amended but not the text of the rule itself. The paragraphs of the Comments are re-ordered and then new paragraphs adopted as part of distinguishing between duties owed with respect to the use of nonlawyers within the firm to provide assistance and the use of nonlawyers outside the firm to provide assistance.

• RPC 5.5 – Revisions to RPC 5.5(d) make clear that lawyers permitted to practice in Tennessee under that subpart may do so through an office or other systematic and continuous presence and add a reference to the ability of other rules in the jurisdiction to authorize practice. Just such a rule, Tenn. Sup. Ct. R. 7, § 5.01(g) addressing practice pending admission, is added as a reference in Comment [18]. Among other minor changes to language in the comment, an explanatory sentence is added to Comment [1].

• RPC 7.1 – The term "prospective client" – which has a completely different meaning as set out in RPC 1.18 – is changed to "the public" in Comment [3].

• RPC 7.2 – A number of revisions are made to paragraphs of the Comment, including updating the kinds of information that can generally be publicly disseminated to include email

addresses and websites and language to make clear that lawyers can participate with, and pay third-parties, for lead generation services as long as the lead generator is not actually engaged in recommending the lawyer or making a referral to the lawyer that is somehow not based in the payment of advertising expenses.

• RPC 7.3 – Again, language in the Comment is revised to replace inaccurate references to "prospective clients," when what is really meant are members of the public. In addition, a new Comment [1] is added to better describe what a solicitation is, and what it is not.

In addition to the changes to those rules discussed above, and reflected on the attached Exhibit A, there are seven changes to Rule 8 in the nature of housekeeping that the TBA would ask the Court to implement at the same time any of the proposed revisions are adopted. Some of these changes are reflected on the redlines in Exhibit A because the rule involved was already going to be included in the redline, but some of the other changes are not shown on the redline because those rules were not otherwise involved in the Ethics 20/20 review. Attached as Exhibit B are the additional housekeeping changes to Rule 8 being proposed that are not already captured in Exhibit A. The proposed clean-up and housekeeping changes already shown on Exhibit A are:

• Comment [1] and [17] (if 20/20 adopted would be [20] to RPC 1.6, the references to RPC 1.9(c)(2) and (c)(1) should just be to (c)

• RPC 5.5 Comment [22] – the reference to Tenn. Sup. Ct. R. 9, § 18.7 needs to be changed and the quoted language corrected to read: Tenn. Sup. Ct. R. 9, § 28.8 (providing, "[b]y no later than twenty days after the effective date of the order [imposing disbarment, suspension, or transfer to disability inactive status], the respondent attorney shall cease to maintain a presence or occupy an office where the practice of law is conducted, except as provided in Section 12.3(c)").

The proposed clean-up and housekeeping changes shown on Exhibit B are as follows:

• RPC 1.11 Comment [5], the reference to RPC 1.13 Comment [6] should be to Comment [8]

• RPC 1.15(b) – the reference to Rule 9, Section 29.1 needs to be changed to Section 35.1, also this change needs to be made in Comment [2]

• RPC 3.5 Comment [1], the references to canons of the Code of Judicial Conduct need to be changed to the correct rules, RJC 3.13 to replace Canon 4(D)(5) and RJC 4.4 to replace Canon 5(B)

• RPC 8.4 Comment [8], the reference to Canon 4, Section D(5) of the Code of Judicial Conduct should be changed to RJC 3.13

• RPC 8.5 Comment [1], the reference to Section 1 of Rule 9 should be changed to Section 8 and the reference to Section 17 of Rule 9 should be changed to Section 25 of Rule 9 and the quote changed to "Reciprocal Discipline"

CONCLUSION

For all of the reasons set forth above, the TBA petitions this Court to adopt the amendments to Tenn. Sup. Ct. R. 8 that are reflected on the attached Exhibits A and B.

Further, the TBA requests that the costs of filing its Petition be waived in the public interest and given the purpose for which submitted.

Respectfully submitted,

/s/ by permission ajp

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served, within 7 days of the filing of this document, upon the individuals and organizations identified in Exhibit C to the petition by regular U.S. Mail, postage prepaid.

ALLAN F. RAMSAUR

EXHIBIT A – PROPOSED ETHICS 20/20 REVISIONS
(Added language is reflected with underlining and
deleted language is shown as ~~struck-through~~)

RULE 1.0: TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government agency, or other organization.

(d) "Fraud" or "fraudulent" denotes an intentionally false or misleading statement of material fact, an intentional omission from a statement of fact of such additional information as would be necessary to make the statements made not materially misleading, and such other conduct by a person intended to deceive a person or tribunal with respect to a material issue in a proceeding or other matter.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual awareness of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a partner in a law firm organized as a partnership or professional limited liability partnership, a shareholder in a law firm organized as a professional corporation, a member in a law firm organized as a professional limited liability company, or a sole practitioner who employs other lawyers or nonlawyers in connection with his or her practice.

(h) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screening" and "screened" denote the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" or "substantially," when used in reference to degree or extent, denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court (including a special master, referee, judicial commissioner, or other similar judicial official presiding over a court proceeding), an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and ~~e-mail~~electronic communications. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(o) "Material" or "materially" denotes something that a reasonable person would consider important in assessing or determining how to act in a matter.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including a governmental agency, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

[5] [Comment intentionally omitted]

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (*e.g.*, a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. *See, e.g.,* RPCs 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some

circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. *See* RPCs 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. *See, e.g.*, RPCs 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screening

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under RPCs 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~information, including information in electronic form, relating

to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel. Although this Rule does not require that the personally disqualified lawyer be prohibited from sharing in any fee generated by the representation in question, such a prohibition can be considered in determining the effectiveness of the screening procedures employed by the firm. For example, a screened lawyer is not prohibited from receiving a salary or partnership share established by prior independent agreement.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to, or consultation or association with, another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. *See also* RPC 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and the use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. *See* RPC 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* RPCs 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. *See* RPC 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8~~6~~] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

DEFINITIONAL CROSS-REFERENCE

"Reasonably" *See* RPC 1.0(h)

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action, unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance, unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* RPC 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations B depending on both the importance of the action under consideration and the feasibility of consulting with the client B this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[3a] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means by which the client's objectives are to be accomplished. This Rule, however, does not attempt to specify the lawyer's duties when the lawyer and client disagree about the means to be used to accomplish the client's objectives. Disagreements between a lawyer and client about those means must be worked out by the lawyer and client within a framework defined by the law of agency, the right of the client to discharge the lawyer and the right of the lawyer to withdraw from the representation if the lawyer has a fundamental disagreement with the client. *See* RPC 1.2, Comment [2].

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client communications, including telephone calls,~~A lawyer should ~~be~~ promptly respond to~~returned~~ or acknowledge~~d~~ client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the

character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in RPC 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or has diminished capacity. *See* RPC 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* RPC 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in withholding or delaying transmission of information to the client, including, for example, when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Other applicable law, including rules or court orders governing litigation, may provide that information supplied to a lawyer may not be disclosed to the client. RPC 3.4(c) directs compliance with such rules or orders.

DEFINITIONAL CROSS-REFERENCES

"Informed consent" *See* RPC 1.0(e)
"Knows" *See* RPC 1.0(f)
"Reasonable" and "reasonably" *See* RPC 1.0(h)

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless:

(1) the client gives informed consent;

(2) the disclosure is impliedly authorized in order to carry out the representation; or

(3) the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;

(2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;

(4) to secure legal advice about the lawyer's compliance with these Rules; ~~or~~

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client~~.~~; or

(6) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm,

but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or

(3) to comply with RPC 3.3, 4.1, or other law.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See RPC 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, RPC 1.9(c)~~(2)~~ for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and RPCs 1.8(b) and 1.9(c)~~(1)~~ for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See RPC 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of

confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. *See also* Scope.

[3a] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

[3b] Information made confidential by this Rule does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. For example, during legal research of an issue while representing a client, a lawyer may discover a particularly important precedent, devise a novel legal approach, or learn the preferable way to frame an argument before a particular judge that is useful both in the immediate matter and in other representation. Such information is part of the general fund of information available to the lawyer.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A disclosure of information in a way that cannot reasonably be linked to the client does not reveal information relating to the representation of a client in violation of this Rule. For example, a lawyer's use of hypotheticals to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[4a] Unless there is a reasonable likelihood of adverse effect to the client, this Rule does not prohibit a lawyer from disclosing information relating to representation of a client for purposes of providing professional assistance to other lawyers, whether informally, as in educational conversations among lawyers, or more formally, as in continuing-legal-education lectures. Thus, a lawyer may generally confer with another lawyer (whether or not in the same firm) concerning an issue in which the disclosing lawyer has gained experience through representing a client in order to assist the other lawyer in representing that lawyer's own clients.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of

their clients, the confidentiality rule is subject to limited exceptions. For example, paragraph (b)(1) permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime.

[7] Paragraph (b)(2) is another limited exception to the rule of confidentiality that permits disclosure to the extent necessary to prevent the client from perpetrating a fraud, as defined in RPC 1.0(d), but only if the fraud is reasonably certain to result in substantial injury to the financial or property interests of another and the client has used or is using the lawyer's services in furtherance of the fraud. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraphs (b)(1) and (b)(2) do not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. *See* RPC 1.2(d). See RPC 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and RPC 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances. In addition, where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization's constituents. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in RPC 1.13(b). RPC 3.3, rather than paragraphs (b)(1) and (b)(2) of this Rule, governs disclosure of a client's intention to commit perjury or other crimes in connection with an adjudicative proceeding.

[8] Paragraph (b)(3) addresses the situation in which a crime in furtherance of which a client has used a lawyer's services has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. For the protection of the client, such disclosures may be made only if they will be protected by the attorney-client privilege.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim brought by the lawyer involving the conduct or representation of a former client, such as when in-house counsel brings suit to redress his or her discharge from an organizational employer in retaliation for abiding by, or refusing to violate, a clear expression of public policy in the Rules of Professional Conduct. *See also* RPC 1.16, Comment [4]. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in a proceeding to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes RPC 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by RPC 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (c)(3) requires the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(6) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. *See* RPC 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than

the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(6) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(6) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(6). Paragraph (b)(6) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15~~3~~] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a proceeding of a tribunal, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16~~4~~] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(5). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and any other factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). *See, e.g.*, RPCs 8.1 and 8.3.

RPC 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. *See* RPC 3.3(h) and (i). Also, in some circumstances, RPCs 4.1(b) and (c) require disclosure of the lawyer's withdrawal from the representation of a client and disaffirmation of written materials prepared for the client.

Disclosure Otherwise Required or Authorized

[174a] Paragraph (c)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm includes life-threatening and debilitating illnesses and the consequences of child sexual abuse. Such harm is reasonably certain to occur if such injuries will be suffered imminently or if there is a present and substantial threat that a person will suffer such injuries at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[174b] A lawyer might be called as a witness to give testimony concerning a client or might be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by RPC 1.4. Unless review is sought, however, paragraph (c)(2) permits the lawyer to comply with the court's order.

Acting Competently to Preserve Confidentiality

[185] ~~A~~Paragraph (d) requires a lawyer ~~must~~to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* RPCs 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the

cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see RPC 5.3, Comments [3]-[4].

[19~~6~~] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20~~17~~] The duty of confidentiality continues after the client-lawyer relationship has terminated. *See* RPC 1.9(c)~~(2)~~. See RPC 1.9(c)~~(1)~~ for the prohibition against using such information to the disadvantage of the former client.

DEFINITIONAL CROSS-REFERENCES

"Fraud" *See* RPC 1.0(d)
"Informed consent" *See* RPC 1.0(e)
"Reasonably" *See* RPC 1.0(h)
"Reasonably Believes" *See* RPC 1.0(i)
"Substantial" *See* RPC 1.0(l)
"Tribunal" *See* RPC 1.0(m)

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or a subject-area of law practice, including goodwill, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the subject-area of practice that has been sold, in the geographic area in which the practice has been conducted;

(b) The entire practice, or the entire subject-area of practice, is sold to one or more lawyers or law firms, and the seller provides the buyer with written notice of the fee agreement with each of the seller's clients and any other agreements relating to each client's representation; and

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale, including the expected effective date of the proposed sale, the identity and office address of the purchaser, a brief description of the size and nature of the purchaser's practice and its capacity to assume the representation of the client in accordance with the Rules of Professional Conduct;

(2) the client's right to retain other counsel or to take possession of the file and any other property or funds in the possession of the selling lawyer to which the client is entitled;

(3) the duties of the purchasing lawyer under paragraph (d) and (e) of this Rule, and

(4) the fact that the client's informed consent to representation by the purchaser and the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within thirty (30) days of receipt of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction or by the presiding judge in the judicial district in which the seller resides. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged each client shall not be increased by reason of the sale; and

(e) The purchasing lawyer shall abide by any other agreements between the selling lawyer and the client with respect to the representation as are permitted by these Rules.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in a subject-area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. *See* RPCs 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of a subject-area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the subject-area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to assume judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon vacating the judicial office.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to an organization.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Tennessee is sufficiently large that a move from one locale therein to another may justify allowing the lawyer to sell his or her practice. Thus, the Rule permits the sale of the practice when the lawyer leaves the geographic area in which he or she is practicing.

[5] This Rule also permits a lawyer or law firm to sell a subject-area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by RPC 1.5(e). For example, a lawyer with a substantial number of estate

planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Subject-Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire subject-area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of RPC 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. *See* RPC 1.6(b)(6). Providing the purchaser access to ~~client-specific~~detailed information relating to the representation, such as ~~and to~~ the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the information specified in paragraphs (c)(1)-(3), and must also be informed in writing that the decision to consent or make other arrangements must be made within thirty (30) days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (*see* RPC 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (*see* RPC 1.7 regarding conflicts and RPC 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (*see* RPCs 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. *See* RPC 1.16.

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice. This Rule also does not apply to mergers between firms.

DEFINITIONAL CROSS-REFERENCES

"Law Firm" *See* RPC 1.0(c)
"Informed consent" *See* RPC 1.0(e)
"Written" *See* RPC 1.0(n)

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who ~~discusses~~consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions~~learned information from ~~with~~ a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as RPC 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that prospective client in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

(e) When no client-lawyer relationship ensues, a prospective client is entitled, upon request, to have the lawyer return all papers and property in the lawyer's possession, custody, or control that were provided by the prospective client to the lawyer in connection with consideration of the prospective client's matter.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations~~discussions~~ with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate~~A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information ~~to a lawyer are entitled to protection under this Rule.~~ about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. *See also* Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such ~~A~~ a person ~~who~~ communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." ~~within the meaning of paragraph (a).~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by RPC 1.9, even if the client or lawyer decides not to proceed with the representation. This duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring information from a prospective client that could be significantly harmful if used in the matter, a lawyer considering whether or not to undertake a new matter should limit the initial ~~interview~~consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under RPC 1.7,

then consent from all affected present clients must be obtained before accepting the representation.

[5] With the informed consent of the prospective client, a lawyer and a prospective client can agree in advance that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See RPC 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter, unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in RPC 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. *See* RPC 1.0(k) and comment [8]-[10] (requirements for screening procedures).

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see RPC 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see RPC 1.15.

DEFINITIONAL CROSS-REFERENCES

"Confirmed in writing" *See* RPC 1.0(b)
"Firm" *See* RPC 1.0(c)
"Informed consent" *See* RPC 1.0(e)
"Knowingly" *See* RPC 1.0(f)
"Reasonable" and "reasonably" *See* RPC 1.0(h)
"Screened" *See* RPC 1.0(k)
"Written" *See* RPC 1.0(n)
"Materially" *See* RPC 1.0(p)

RULE 4.4: RESPECT FOR THE RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not:

(1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person; or

(2) threaten to present a criminal or lawyer disciplinary charge for the purpose of obtaining an advantage in a civil matter.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is protected by RPC 1.6 (including a document or electronically stored information protected by the attorney-client privilege or the work-product rule) and has been disclosed to the lawyer inadvertently or by a person not authorized to disclose such a document or electronically stored information to the lawyer, shall:

(1) immediately terminate review or use of the information;

(2) notify the person, or the person's lawyer if communication with the person is prohibited by RPC 4.2, of the inadvertent or unauthorized disclosure; and

(3) abide by that person's or lawyer's instructions with respect to disposition of written information or refrain from using the written information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. For example, a lawyer may not secretly record a conversation or the activities of another person if doing so would violate state or federal law specifically prohibiting such recording. Otherwise, this Rule does not prohibit secret recording so long as the lawyer has a substantial purpose other than to embarrass or burden the persons being recorded. It would be a violation of RPC 4.1 or RPC 8.4(c), however, if the lawyer stated falsely or affirmatively misled another to believe that a conversation or an activity was not being recorded. By itself, however, secret taping does not violate

either RPC 8.4(c) (prohibition against dishonest or deceitful conduct) or RPC 8.4(d) (prohibition against conduct prejudicial to the administration of justice.)

[2] The duties imposed by paragraph (b) on lawyers who know or who reasonably should know that they have received information protected by RPC 1.6 that was disclosed to them inadvertently or by a person not authorized to disclose the information to them reflect the importance of client-lawyer confidentiality in the jurisprudence of this state and the judgment that lawyers in their dealings with other lawyers and their clients should take the steps that are required by this Rule in the interest of protecting client-lawyer confidentiality even if it would be to the advantage of their clients to do otherwise. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email, and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] This Rule, however, does not prohibit the receiving lawyer from seeking a definitive court ruling as to the proper disposition of such information, including a ruling regarding whether the disclosure effects a waiver of the attorney-client privilege or work-product rule. In making any disclosure to a court to obtain a ruling regarding disposition of the information, any disclosure of the information should be made in a manner that limits access to the information to the tribunal, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

DEFINITIONAL CROSS-REFERENCES

"Knows" and "knowingly" *See* RPC 1.0(f)
"Reasonably should know" *See* RPC 1.0(j)
"Substantial" *See* RPC 1.0(l)
"Written" *See* RPC 1.0(n)

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCETS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the nonlawyer is employed, or has direct supervisory authority over the nonlawyer, and knows of the nonlawyer's conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment ***[Ethics 20/20 swaps the order of [1] and [2], the TBA has swapped the order first, and only after that, tracked changes to the words using the redlining format otherwise used in this document]***

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measuresestablish internal policies and procedures designed to provide giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matterswill act in a way compatible with the professional obligations of the lawyerRules of Professional Conduct. *See* Comment [6] to RPC 1.1 (retaining lawyers outside the firm) RPC 5.1, and Comment [1] to RPC 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over suchthe work of a nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of sucha nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[2] Lawyers generally employ ~~nonlawyer~~ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers ~~assistants~~ should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. *See also* RPCs 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. *See* RPC 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

DEFINITIONAL CROSS-REFERENCES

"Firm" and "law firm" *See* RPC 1.0(c)
"Knows" *See* RPC 1.0(f)
"Partner" *See* RPC 1.0(g)

"Reasonable" *See* RPC 1.0(h)

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law or rule of this jurisdiction.

(e) A lawyer authorized to provide legal services in this jurisdiction pursuant to paragraph (d)(1) of this Rule may also provide pro bono legal services in this jurisdiction, provided that these services are offered through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically authorized in this jurisdiction and provided that these are services for which the forum does not require pro hac vice admission.

(f) A lawyer providing legal services in Tennessee pursuant to paragraph (c) or (d) shall advise the lawyer's client that the lawyer is not admitted to practice in Tennessee and shall obtain the client's informed consent to such representation.

(g) A lawyer providing legal services in Tennessee pursuant to paragraph (c) or (d) shall be deemed to have submitted himself or herself to personal jurisdiction in Tennessee for claims arising out of the lawyer's actions in providing such services in this state.

(h) A lawyer or law firm shall not employ or continue the employment of a disbarred or suspended lawyer as an attorney, legal consultant, law clerk, paralegal or in any other position of a quasi-legal nature.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* RPC 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and

persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. *See also* RPCs 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult Tenn. Sup. Ct. R. 47.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. *See* Tenn. Sup. Ct. R. 7, ' 10.01 (Registration of In-House Counsel).

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or

other law, which includes statute, court rule, executive regulation or judicial precedent. *See, e.g.*, Tenn. Sup. Ct. R. 7, § 5.01(g) (Practice Pending Admission by Applicant Licensed in Another Jurisdiction).

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. *See* RPC 8.5(a). Additionally, under paragraph (g), a lawyer providing legal services in Tennessee pursuant to paragraphs (c) or (d) shall be deemed to have submitted himself or herself to personal jurisdiction in Tennessee for claims arising out of the lawyer's actions in providing such services in this state.

[20] Paragraph (f) requires a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) to inform the client that the lawyer is not licensed to practice law in this jurisdiction. *See also* RPC 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by RPCs 7.1 to 7.5.

[22] Paragraph (h) provides that a lawyer or law firm may not employ or continue the employment of a disbarred or suspended lawyer as an attorney, legal consultant, law clerk, paralegal or in any other position of a quasi-legal nature. That paragraph is consistent with existing Tennessee law. *See* Formal Ethics Opinion 83-F-50; Tenn. Sup. Ct. R. 9, § 28.8~~18.7~~ (providing, "[b~~u~~]y~~pon~~ no later than twenty days after the effective date of the order [imposing disbarment, suspension or transfer to disability inactive status], the respondent attorney shall cease to~~not~~ maintain a presence or occupy an office where the practice of law is conducted, except as provided in Section 12.3(c)").

DEFINITIONAL CROSS-REFERENCES

"Informed consent" *See* RPC 1.0(e)
"Reasonably" *See* RPC 1.0(h)
"Tribunal" *See* RPC 1.0(m)

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by RPC 7.2 and solicitations directed to specific recipients permitted by RPC 7.3. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public~~a prospective client~~.

[4] See RPC 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] A lawyer may advertise the fact that a subjective characterization or description has been conferred upon him or her by an organization as long as the organization has made inquiry into the lawyer's fitness and does not issue or confer such designations indiscriminately or for a price.

DEFINITIONAL CROSS-REFERENCE

"Material" and "materially" *See* RPC 1.0(o)

RULE 7.2: ADVERTISING

(a) Subject to the requirements of paragraphs (b) through (d) below and RPCs 7.1, 7.3, 7.4, and 7.5, a lawyer may advertise services through written, recorded, or electronic communication, including public media.

(b) A copy or recording of each advertisement shall be retained by the lawyer for two years after its last dissemination along with a record of when and where the advertisement appeared.

(c) A lawyer shall not give anything of value to a person for recommending or publicizing the lawyer's services except that a lawyer may pay for the following:

(1) the reasonable costs of advertisements permitted by this Rule;

(2) the usual charges of a registered intermediary organization as permitted by RPC 7.6;

(3) a sponsorship fee or a contribution to a charitable or other non-profit organization in return for which the lawyer will be given publicity as a lawyer; or

(4) a law practice in accordance with RPC 1.17.

(d) Except for communications by registered intermediary organizations, any advertisement shall include the name and office address of at least one lawyer or law firm assuming responsibility for the communication.

Comment

[1] This Rule governs general advertising through public media and other communications that are not directed to specifically identified individuals. The Rule encompasses all possible media through which such communications may be directed to the public. Communications that are directed to specifically identified recipients are governed by RPC 7.3.

[2] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Further, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services is significant. Nevertheless, advertising by lawyers shall not contain false or misleading communications about the lawyer or the lawyer's services.

[3] Among other things, this Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[4] Neither this Rule nor RPC 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a lawyer retain a copy or recording of any advertisement for two years after its last dissemination along with a record of when and where the advertisement appeared. If advertisements that are similar in all material respects are published or displayed more than once or distributed to more than one person, the lawyer may comply with this requirement by retaining a single copy of the advertisement for two years after the last of the materially similar advertisements are disseminated. A lawyer may comply with the requirement of paragraph (b) by complying with guidelines that may be adopted by the Board of Professional Responsibility concerning certain types of advertisements, including websites, e-mail, or other electronic forms of communication or of changes to such communications.

Paying Others to Recommend a Lawyer

[6] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of RPC 1.17, but otherwise is not permitted to pay another person for channeling professional work to the lawyer. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

[7] A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead

generator is consistent with RPCs 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with RPC 7.1 (communications concerning a lawyer's services). To comply with RPC 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* RPC 5.3 ~~for the~~ (duties of lawyers and law firms with respect to the conduct of nonlawyers); RPC 8.4(a) (duty to avoid violating the Rules through the acts of another) ~~who prepare marketing materials for them~~.

DEFINITIONAL CROSS-REFERENCES

"Law firm" *See* RPC 1.0(c)
"Reasonable" *See* RPC 1.0(h)
"Written" *See* RPC 1.0(n)

RULE 7.3: SOLICITATION OF POTENTIAL CLIENTS

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer; or

(3) has initiated a contact with the lawyer.

(b) A lawyer shall not solicit professional employment from a potential client by written, recorded, or electronic communication or by in-person, live telephone, or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence; or

(3) a significant motive for the solicitation is the lawyer's pecuniary gain and the communication concerns an action for personal injury, divorce or legal separation, worker's compensation, wrongful death, or otherwise relates to an accident, filing of divorce or legal separation, or disaster involving the person to whom the communication is addressed or a member of that person's family, unless the accident, filing of divorce or legal separation, or disaster occurred more than thirty (30) days prior to the mailing or transmission of the communication or the lawyer has a family, close personal, or prior professional relationship with the person solicited.

(c) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not send a written, recorded, or electronic communication soliciting professional employment from a specifically identified recipient who is not a person specified in paragraphs (a)(1) or (a)(2) or (a)(3), unless the communication complies with the following requirements:

(1) The words "Advertising Material" appear on the outside of the envelope, if any, in which a communication is sent and at the beginning and ending of any written, recorded or electronic communication.

(2) A lawyer shall not state or imply that a communication otherwise permitted by these rules has been approved by the Tennessee Supreme Court or the Board of Professional Responsibility.

(3) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked "SAMPLE" and the words "DO NOT SIGN" shall appear on the client signature line.

(4) Written communications shall not be in the form of or include legal pleadings or other formal legal documents.

(5) Communications delivered to potential clients shall be sent only by regular U.S. mail and not by registered, certified, or other forms of restricted delivery, or by express delivery or courier.

(6) Any communication seeking employment by a specific potential client in a specific matter shall comply with the following additional requirements:

(i) The communication shall disclose how the lawyer obtained the information prompting the communication;

(ii) The subject matter of the proposed representation shall not be disclosed on the outside of the envelope (or self-mailing brochure) in which the communication is delivered; and

(iii) The first sentence of the communication shall state, "IF YOU HAVE ALREADY HIRED OR RETAINED A LAWYER IN THIS MATTER, PLEASE DISREGARD THIS MESSAGE."

(7) A copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule shall be retained by the lawyer for two years after its last dissemination along with a record of when, and to whom, it was sent.

(d) Unless the contents thereof include a solicitation of employment, a lawyer need not comply with the requirements of paragraph (c) above when sending announcements of an association or affiliation with another lawyer that complies with the requirements of RPC 7.5, newsletters, brochures, and other similar communications.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood

as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website, or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2~~1~~] There is a potential for abuse when a solicitation involves~~inherent in~~ direct in-person, live telephone, or real-time electronic contact by a lawyer with a potential client known to need legal services. These forms of contact between a lawyer and a potential client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The potential client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching. The restrictions set forth in this Rule, however, do not apply to efforts by a lawyer to get hired as an in-house counsel by a potential client.

[3~~2~~] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation of potential clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under this Rule offer alternative means of conveying necessary information to potential clients who may be in need of legal services. Advertising and written and recorded communications which may be mailed or electronically transmitted make it possible for a potential client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential client to direct in-person, live telephone, or real-time electronic persuasion that may overwhelm a~~the client~~ person's judgment.

[4~~3~~] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to potential client, rather than direct in-person, live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer and a potential client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4~~5~~] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a family, close personal, or prior professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in

RPC 7.3(a) and the requirements of RPC 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[6~~5~~] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information which is false or misleading within the meaning of RPC 7.1, which involves coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence, which involves contact with someone~~a prospective client~~ who has made known to the lawyer a desire not to be solicited by the lawyer, or which occurs within thirty (30) days after an accident or disaster involving the individual or a member of the individual's family, is prohibited by RPC 7.3(b). Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by RPC 7.2 the lawyer receives no response, any further effort to communicate with the potential client may violate the provisions of RPC 7.3(b)(1). Communications directed to specifically identified recipients must be identified as advertisements, may need to be marked with other disclaimers, and cannot be formatted or delivered in such a manner as to mislead the recipient about the nature of the communication.

[~~5~~6A] RPC 7.3(b)(3) includes a prohibition against any solicitation of a prospective client within thirty (30) days of the filing of a complaint for divorce or legal separation involving that person, if a significant motive for the solicitation is the lawyer's pecuniary gain. Some divorce or legal separation cases involve either an alleged history of domestic violence or a potential for domestic violence. In such cases, a defendant spouse's receipt of a lawyer's solicitation prior to being served with the complaint can increase the risk of a violent confrontation between the parties before the statutory injunctions take effect. *See* Tenn. Code Ann. § 36-4-106(d) (2014) (imposing specified temporary injunctions, including "[a]n injunction restraining both parties from harassing, threatening, assaulting or abusing the other," that take effect "[u]pon the filing of a petition for divorce or legal separation, *and upon personal service of the complaint and summons on the respondent* or upon waiver and acceptance of service by the respondent") (emphasis added) The prohibition in RPC 7.3(b)(3) against any solicitation within thirty (30) days of the filing of a complaint for divorce or legal separation is intended to reduce any such risk and to allow the plaintiff spouse in such cases to take appropriate steps to seek shelter, an order of protection, and/or any other relief that might be available.

[76] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties if the lawyer's purpose is to inform such entities of the lawyer's willingness to cooperate with the plan in compliance with RPC 7.6. This form of communication is not directed to a potential client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become potential clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to, and serve the same purpose as, advertising permitted under RPC 7.2.

[87] The requirement in RPC 7.3(c) that certain communications be marked as advertisements and contain other disclaimers do not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. Nor do those requirements apply to general announcements by lawyers, including changes in personnel or office location, newsletters, brochures, and other similar communications which do not contain a solicitation of professional employment.

[98] Paragraph (c)(6) requires that a lawyer retain a copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule for two years after its last dissemination along with a record of the name of the person contacted and the person's address, telephone number, or telecommunication address to which the communication was sent. If communications identical in content are sent to two or more persons, the lawyer may comply with this requirement by retaining a single copy of the communication together with a list of the names and addresses of the persons to whom the communications were sent.

DEFINITIONAL CROSS-REFERENCES

"Fraud" *See* RPC 1.0(d)
"Known" *See* RPC 1.0(f)
"Written" *See* RPC 1.0(n)

EXHIBIT B – PROPOSED "HOUSEKEEPING" REVISIONS
(Added language is reflected with underlining and
deleted language is shown as ~~struck-through~~)

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

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Comment

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[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. *See* RPC 1.13, Comment [8~~6~~].

* * *

RULE 1.15: SAFEKEEPING PROPERTY AND FUNDS

* * *

(b) Funds belonging to clients or third persons shall be deposited in a separate account maintained in an FDIC member depository institution having a deposit-accepting office located in the state where the lawyer's office is situated (or elsewhere with the consent of the client or third person) and which participates in the required overdraft notification program as required by Supreme Court Rule 9, Section ~~29~~35.1. A lawyer may deposit the lawyer's own funds in such an account for the sole purpose of paying financial institution service charges or fees on that account, but only in an amount reasonably necessary for that purpose. Other property shall be identified as such and appropriately safeguarded. Complete records of such funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(1) Except as provided by subparagraph (b)(2), interest earned on accounts in which the funds of clients or third persons are deposited, less any deduction for financial institution service charges or fees (other than overdraft charges) and intangible taxes collected with respect to the deposited funds, shall belong to the clients or third persons whose funds are deposited, and the lawyer shall have no right or claim to such interest. Overdraft charges shall not be deducted from accrued interest and shall be the responsibility of the lawyer.

(2) A lawyer shall deposit all funds of clients and third persons that are nominal in amount or expected to be held for a short period of time such that the funds cannot earn income for the benefit of the client or third persons in excess of the costs incurred to secure such income in one or more pooled accounts known as an "Interest on Lawyers' Trust Account" ("IOLTA"), in accordance with the requirements of Supreme Court Rule 43. A lawyer shall not deposit funds in any account for the purpose of complying with this sub-section unless the account participates in the IOLTA program under Rule 43.

(3) The determination of whether funds are required to be deposited in an IOLTA account pursuant to subparagraph (b)(2) rests in the sound discretion of the lawyer. No charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's exercise of good faith judgment in making such a determination.

* * *

Comment

* * *

[2] Paragraph (b) of this Rule contains the fundamental requirement that a lawyer maintain funds of clients and third parties in a separate trust account. All such accounts, including IOLTA accounts, must be part of the overdraft notification program established under Supreme Court Rule 9, Section ~~29~~35.1.

* * *

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

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Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Tennessee Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. For example, a lawyer shall not give or lend anything of value to a judge, judicial officer, or employee of a tribunal, except as permitted by RJC 3.13~~Canon 4(D)(5)~~ of the Code of Judicial Conduct. A lawyer, however, may make a contribution to the campaign fund of a candidate for judicial office in conformity with RJC 4.4~~Canon 5(B)~~ of the Code of Judicial Conduct.

* * *

RULE 8.4: MISCONDUCT

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Comment

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[8] Paragraph (f) precludes a lawyer from assisting a judge or judicial officer in conduct that is a violation of the rules of judicial conduct. A lawyer cannot, for example, make a gift, bequest, favor, or loan to a judge, or a member of the judge's family who resides in the judge's household, unless the judge would be permitted to accept, or acquiesce in the acceptance of such a gift, favor, bequest, or loan in accordance with RJC 3.13~~Canon 4, Section D(5)~~ of the Code of Judicial Conduct.

* * *

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

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Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. *See* Tenn. Sup. Ct. R. 9, § 8~~1~~ ("Jurisdiction") and § 25~~17~~ ("Reciprocal~~ity~~ Discipline").

* * *

[6] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with RPC 1.11 and to take appropriate action if it believes the lawyer is not complying.

[7] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

[8] Paragraphs (b) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by RPC 1.7 and is not otherwise prohibited by law.

[9] Paragraph (d) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

[11] In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this Rule.

DEFINITIONAL CROSS-REFERENCES